Supreme Court, U.S.
FILED
AUG 5 1998
OFFICE OF THE CLERK

(2)

No. 98-89

IN THE

Supreme Court of The United States

October Term, 1998

J.A. CROSON COMPANY,

Petitioner,

v.

J.A. GUY, INC., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

BRIEF OF AMICUS CURIAE ASSOCIATED BUILDERS AND CONTRACTORS, INC., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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August 6, 1998

Balmar Legal Publishing Services, Washington, D.C. (202) 682-9800

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BRIEF OF AMICUS CURIAE ASSOCIATED BUILDERS AND CONTRACTORS, INC., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF THE AMICUS

Associated Builders and Contractors, Inc. ("ABC") is a national trade association of more than 20,000 construction industry contractors and related firms. ABC represents all segments of the industry, including both unionized and non-union employers, many of whom perform work on public construction projects covered by prevailing wage laws at both the state and federal levels. Petitioner J.A. Croson Company is a member of ABC.

More than 800 of ABC's other members, employing thousands of workers, also are located in the State of Ohio. Many of these contractors perform work covered under Ohio's Prevailing Wage Law, which has been in existence since 1931. The stated purpose of the law is the same as the federal Davis-Bacon Act, *i.e.*, to prevent contractors from

undercutting employee wages in the process of competing for government construction work. *State ex rel. Evans v. Moore*, 69 Ohio St. 2d 88, 91 (1982).

Thus, when performing work covered by the Prevailing Wage Law, ABC's member employers, like all employers covered by the statute, are required to pay their employees in accordance with the minimum labor standards established by the Ohio Department of Industrial Relations. Contractors are not permitted to arrange for portions of the employee wages paid in accordance with the Prevailing Wage Law to be deducted and later returned to the employers, either directly or indirectly.

Union job targeting programs are of much more recent vintage than the Prevailing Wage Law. They were created in the 1980's expressly as a device for returning portions of employee wages to unionized employers who claimed to be uncompetitive with lower cost, non-union contractors. In order to obtain an increased share of the construction market, practitioners of job targeting undercut their employee/members' wages on a "pooled" basis, while returning those wages to employers in a selective, or targeted fashion. *See* Metzger, "Buying the Job," VII Labor Research Review 51, 53-4 (Fall 1988)("[E]ach working electrician is losing 60 cents an hour and that money is going out of his/her pocket and into the pocket of a contractor.")

ABC was the first organization at the national level to point out the conflict between certain union job targeting programs and prevailing wage laws. ABC first challenged the funding mechanisms of job targeting programs under the federal Davis-Bacon Act in a proceeding which began in 1989 and which ultimately led to the D.C. Circuit's seminal holding in *Building and Construction Trades Dep't, AFL-CIO v. Reich*, 40 F.3d 1275 (D.C. Cir. 1995). The D.C. Circuit's holding then was reaffirmed by the Ninth Circuit in *IBEW, Local 357 v. Brock*, 68 F. 3d 1194 (9th Cir. 1995).

ABC's filing of an amicus brief in the present action is prompted by the Supreme Court of Ohio's recent decision, the

logic of which effectively forecloses any state from enforcing a prevailing wage law against unions and union contractors involved in a job targeting program. ABC strongly supports the contentions of Petitioner Croson that job targeting programs violate Ohio's Prevailing Wage Law, for many of the reasons identified by the D.C. Circuit and Ninth Circuit relative to the federal Davis-Bacon Act. ABC further agrees that the Ohio court's decision is in direct conflict with this Court's decision in *California Division of Labor Standards Enforcement v. Dillingham Const. NA, Inc.*, 117 S. Ct. 832 (1997), which upheld the states' traditional right to enforce their prevailing wage laws, against similar claims of federal labor law preemption. For each of these reasons, this Court should grant the writ and reverse the decision of the Supreme Court of Ohio.

STATEMENT OF THE CASE

Amicus ABC adopts the statement of the case set forth in the Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I. THE CONFLICT BETWEEN THE FUNDING OF JOB TARGETING PROGRAMS AND THE ENFORCEMENT OF PREVAILING WAGE LAWS IS AN ISSUE OF NATIONAL IMPORTANCE WHICH SHOULD BE RESOLVED BY THIS COURT.

The rebate of government-mandated wages from workers back to contractors is facially antithetical to prevailing wage laws. *Building and Construction Trades Dep't, AFL-CIO v. Reich*, 40 F.3d 1275 (D.C. Cir. 1995); *IBEW, Local 357 v. Brock*, 68 F. 3d 1194 (9th Cir. 1995). This Court has further held that prevailing wage laws are traditional exercises of state police powers which are not preempted by federal labor law. *California Division of Labor Standards Enforcement v. Dillingham Const. NA, Inc.*, 117 S. Ct. 832 (1997). Absent

reversal, the decision of the Ohio Supreme Court in the present case will allow unionized contractors to exempt themselves from the traditionally established prevailing wage requirements of at least 33 states, with regard to publicly funded rebates subsidizing job targeting programs. The Ohio court's erroneous expansion of federal labor law preemption will have clear adverse impact on a national scale and must be reversed.

Since 1931, the Davis-Bacon Act has required that wages paid on federal public works projects equal wages paid on similar construction jobs in a given federal project's locale. A fundamental purpose of the Act was to "provide a minimum wage for construction workers in order to prevent contractors from underbidding local competition" on federal jobs. *International Brotherhood of Elec. Workers, Local 357 v. Brock*, 68 F.3d 1194, 1201 (9th Cir. 1995). In the same year that Congress enacted Davis-Bacon, Ohio enacted its own Prevailing Wage Law mandating analogous wage requirements with regard to state-funded projects. It has been recognized that the purpose of the Ohio law is the same as the federal Davis-Bacon Act—to prevent contractors from undercutting employee wages in the process of competing for government construction work. *See, e.g., State ex rel. Evans v. Moore*, 431 N.E.2d 311, 313 (1982).

Ohio is not the only state which has enacted a prevailing wage law mirroring the federal mandates of Davis-Bacon. To date, at least thirty-three (33) states have enacted such laws establishing minimum wages to be paid to employees working on public contracts. Northrup & White, "Subsidizing Contractors to Gain Employment: Construction Union 'Job Targeting,'" 17 *Berkeley Journal of Employment and Labor Law* 62, 80 (1996). In recognition of their federal progenitor, these state statutes often are referred to as "Little Davis-Bacon" statutes. *Id. See also California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 117 S. Ct. 832, 835, 840 (1997)

In order to effect their requirement that a prevailing wage ***actually be paid*** to laborers, Davis-Bacon and its state progeny have provisions expressly prohibiting contractors from receiving a rebate or "kick back" of money from the wages paid to their workers. For example, Davis-Bacon requires that employees be paid "without subsequent deduction or rebate . . . regardless of any contractual relationship which may exist between the contractor or subcontractor and such laborers . . . ." *Building and Construction Trades Dep't, AFL-CIO v. Reich*, 40 F.3d 1275, 1277 (D.C. Cir. 1994) (quoting 40 U.S.C. § 276a(a)). Any kickback or rebate made in contravention of this provision could result in the imposition of civil liability. *Brock*, 68 F.3d at 1198.

Despite nearly a half-century of restraint on kickbacks and rebates, in the 1980's unions created job targeting programs expressly as a device for returning portions of employee wages to unionized employers who claimed to be uncompetitive with lower cost, non-union contractors. In order to obtain an increased share of the construction market, practitioners of job targeting have chosen to undercut their employee/members' wages on a "pooled" basis, while returning the money to employers in a selective, or targeted fashion. *See* Metzger, "Buying the Job," VII *Labor Research Review* 51, 53-54 (Fall 1988)([E]ach working electrician is losing 60 cents an hour and that money is going out of his/her pocket and into the pocket of a contractor.").

The unions' job targeting programs have become widespread and have had significant economic impact in some parts of the country. The programs have resulted in the redistribution of millions of dollars from union workers to selected union contractors, including the rebate of wages paid to employees on state-funded projects covered by prevailing wage laws. For example, the job targeting program giving rise to the Ohio case has allowed the United Association of the Plumbers and Pipefitters of Industry of the United States and Canada Local 189 ("Local 189") to distribute over

$450,000 annually in targeting funds. *See also* "Market Recovery Fund Works!," IBEW J., at 23 (Aug. 1993) (stating that local union's job targeting program was responsible for securing over $74,000,000 in construction work).

ABC members often bid against union contractors on public projects but are incapable of artificially deflating their own labor costs through a rebate mechanism. In 1989, ABC first challenged the application of job targeting programs under the federal Davis-Bacon Act. That proceeding ultimately led to the D.C. Circuit's holding in *Building and Construction Trades Dep't, AFL-CIO v. Reich*, 40 F.3d 1275 (D.C. Cir. 1995). The D.C. Circuit agreed with ABC and the U.S. Department of Labor that job targeting dues assessments, to the extent that they returned portions of public works prevailing wages from employees to employers, violated the Davis-Bacon Act. The D.C. Circuit's analysis and holding then were reaffirmed by the Ninth Circuit in *IBEW, Local 357 v. Brock*, 68 F.3d 1194 (9th Cir. 1995). *See also Associated Builders and Contractors, Inc., Golden Gate Chapter v. Local 302, IBEW*, 109 F. 3d 1353 (9th Cir. 1997), where the U.S. Court of Appeals for the Ninth Circuit declined to rule that state law claims challenging job targeting programs' compliance with prevailing wage laws were preempted by Section 301 of the LMRA.

Following *Reich* and *Brock*, it is clear that job targeting programs violate federal prevailing wage laws where they involve the rebate of wages paid on publicly funded projects back unionized employers. This is not to say that the federal court holdings invalidate all job targeting programs. Rather, the courts have only restricted the funding of job targeting programs so that they do not cause the unlawful rebate of employee wages from projects covered by a prevailing wage law. This is all that the Petitioner requested from the Ohio Supreme Court in the present case.

Given the substantive similarities between Davis-Bacon and the "Little Davis-Bacon" statutes of the several states, there appears little doubt that job targeting programs, to the

extent they are funded by rebates from wages paid on public projects, run afoul of state prevailing wage laws as well. *See Int'l Broth. of Elec. Workers v. Aubry* (Cal. App. 1996) 41 Cal. App. 4th 1632, 49 Cal. Rptr. 2d 759 (job targeting deduction held not to constitute union "dues" for purposes of enforcing state's prevailing wage law.). Unions have attempted to avoid this compelling logic and protect their labor-cost shell game by suggesting that the NLRA preempts states from enforcing their prevailing wage laws. In this regard, they have relied on an NLRB finding that does not address minimum wage requirements but merely holds that job targeting as a general matter is protected conduct under the NLRA. *See Manno Electric, Inc.*, 321 NLRB 278, 298 (1996).

The issue of NLRA preemption of state prevailing wage laws thus remains unresolved and in dire need of guidance from this Court as evidenced by the recent decision of the Supreme Court of Ohio. In reaching its conclusion that state prevailing wage laws are preempted, the Ohio court contravened the established jurisprudence of this Court and the circuit courts. Moreover, the Ohio decision establishes an anomalous dichotomy—unions are foreclosed from rebating wages earned on ***federal*** projects under Davis-Bacon, but are free to rebate wages earned on ***state*** projects notwithstanding the states' desire to enforce minimum labor standards under their Little Davis-Bacon acts. This errant conclusion and conflict has national significance and requires resolution by this Court.

II. THE HOLDING OF THE SUPREME COURT OF OHIO CONFLICTS WITH THE DECISIONS OF THIS COURT AND THE CIRCUIT COURTS.

In attempting to address the issue of whether states may maintain minimal labor standards in light of the preemptive effect of the NLRA, the decision of the Supreme Court of Ohio has misapprehended the established jurisprudence of this Court and the circuit courts. The decision of the Supreme Court of Ohio eviscerates the right of Ohio, and by

implication the many other states with prevailing wage laws, to exercise police power and establish minimum labor standards of general applicability. In doing so, the court has broadly expanded without justification the preemptive effect of the NLRA.

A. The Supreme Court Of Ohio Erred In Finding All State Regulation Of Job Targeting Programs To Be Preempted By Virtue Of The *Manno Electric* NLRB Decision.

The Supreme Court of Ohio erred in artificially truncating its preemption analysis in concluding that, because the NLRB generally has deemed job targeting programs to be protected conduct under Section 7 of the NLRA, state laws affecting job targeting programs are necessarily preempted. Applying a *Garmon* preemption analysis, *see San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), the court stated that, "[b]ecause the NLRB has held that job targeting is actually protected by the NLRA, there is no room for state regulation infringing that conduct." Pet. App. at 17a. This holding simply is erroneous and unduly expands the NLRB's holding in *Manno Electric*.

It is uncontroverted that the NLRB in *Manno Electric*, 321 NLRB 278 (1996), stated that a union's use of a job targeting program is protected under Section 7 of the NLRA. *Id.* at 298. However, that case did not address a challenge to a job targeting program based upon a violation of a state prevailing wage law; rather, the Board considered only whether job targeting programs were *lawful* under the NLRA and state antitrust laws. The distinction is not one of mere factual dissimilarity as suggested by the Supreme Court of Ohio, Pet. App. at 17a; rather, it is one of central legal significance insofar as the Ohio court would apply *Manno Electric*'s general statement to foreclose *any* degree of state regulation, no matter the factual or legal context. This conclusion is plainly contrary to law.

For example, it is beyond argument that union picketing and solicitation generally are lawful and "protected" conduct under Section 7 of the NLRA. *Longshoremen v. Ariadne Shipping Co.*, 397 U.S. 195 (1969). Notwithstanding this fact, it is equally certain that states may enforce trespass laws where the generally protected activity is carried out in such a manner as to violate the property rights of an employer. *See, e.g., Sears , Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 206-07 (1978) (discussing the viability of state trespass actions with regard to union picketing and solicitation). Thus, the Supreme Court of Ohio's application of talismanic significance to the NLRB's indication that job targeting programs are lawful begs the preemption question. The Ohio court has improperly ignored the more pointed issue of whether job targeting programs ***which violate prevailing wage laws*** may be subject to state regulation, just as pickets which violate state trespass laws may be subject to state regulation.

The Supreme Court of Ohio highlighted the deficiency of its analysis and presumption of "actually protected" status for ***any and all*** job targeting programs with its referencing of the *Sears* decision. The Ohio court noted this Court's recognition in *Sears* that "[p]rior to granting any relief for trespass . . . , the state court would have to decide that ***the trespass*** was not actually protected by federal law." Pet. App. at 18a (citing *Sears*, 436 U.S. at 201). The general status of picketing as lawful, protected conduct under Section 7 was not dispositive of the protected status of the particular conduct at issue in *Sears*, however. Rather, the Court looked to the ***specific circumstances*** of the picketing and whether the controversy was the same as or different from that which could be presented to the NLRB, in order to determine whether the union's particular conducted was "actually protected."

Incongruously, the Supreme Court of Ohio did not require itself to enter such a pointed inquiry with regard to a job targeting program's facial violation of Ohio's prevailing wage law prior to denying relief to Petitioner Croson. The

Ohio court's acceptance of the *Manno Electric* decision as a blanket bar to any state regulation artificially truncated its preemption analysis.[1] When fully examined, it is clear that, under the precedents of this Court and the circuit courts, job targeting programs are not exempted wholly from state authority, and the states may enforce their minimum labor standards.

B. No Authority Requires Preemption Of Ohio's Prevailing Wage Law; Rather, The Law Should Be Enforced Against Job Targeting Programs Which Are Funded Through Unlawful Rebates Of Prevailing Wages Paid On State-Funded Projects.

In halting its analysis with the *Manno Electric* "protected conduct" label, the Ohio high court failed to address the salient issue before the Court—whether Ohio, and the several states which have enacted prevailing wage laws, may require that job targeting programs, notwithstanding their generally protected status, avoid undermining minimum labor standards. This distinction and its import are conclusively demonstrated by federal cases restricting job targeting programs where they resulted in violations of the Davis-Bacon Act. *Building and Construction Trades Dep't, AFL-CIO v. Reich*, 40 F.3d 1275 (D.C. Cir. 1995); *IBEW, Local 357 v. Brock*, 68 F.3d 1194 (9th Cir. 1995).[2] There as here,

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[1] For example, under the Ohio analysis, a union even would be capable of establishing a job targeting program in which their members wages were reduced below Ohio's minimum wage, given that the minimum wage law would be an impermissible state regulation of an "actually protected" job targeting program.

[2] More recently, in *Associated Builders and Contractors, Inc., Golden Gate Chapter v. Local 302, IBEW*, __ F. 3d __, 154 LRRM 2871 (9th Cir. March 27, 1997), the U.S. Court of Appeals for the Ninth Circuit rejected the contention that state law claims challenging job targeting programs' compliance with prevailing wage laws were

the unions and unionized contractors argued that the NLRB had authorized job targeting deductions and that such deductions were permitted under Section 302 of the LMRA.

The *Reich* and *Brock* courts did not find it necessary to agree or disagree with the unions' contentions. The courts simply found them to be irrelevant to the separate inquiry of whether job targeting should be permitted to undermine the minimum labor standards of a prevailing wage law. As the D.C. Circuit stated: "Nothing in the interpretation of similar terms in the NLRA and the LRMA establishes that [the Department of] Labor's interpretation of the Davis-Bacon Act is unreasonable or of its own regulation is plainly erroneous." *Reich*, 40 F. 3d at 1282. The Ninth Circuit likewise "rejected union contentions that interpretations of the term "periodic dues," taken from the National Labor Relations Act context, are relevant in determining whether job targeting program assessments are "membership dues" under Davis-Bacon Act regulations." *Brock*, 68 F. 3d at 1197.

The same holding applies to the present case and properly led Ohio's Fourth Appellate District to find no federal preemption of the state's Prevailing Wage Law. The question of job targeting's ***legality*** under the federal or state statutes is not before the Court. The sole question is whether the state is entitled to maintain its traditional minimum labor standards and to expect unionized contractors and unions to comply therewith.[3]

(Footnote continued from previous page.)

preempted by Section 301 of the LMRA. The court did not reach other preemption theories, but nevertheless concluded that state law claims relating to job targeting and prevailing wage laws could be resolved independently of and without interpreting the job targeting agreements themselves. *Id.*, 154 LRRM at 2874.

[3] The Ohio Supreme Court's decision also conflicts with the decision of the California appellate court in *Int'l Broth. of Elec. Workers v. Aubry* (Cal. App. 1996) 41 Ca. App. 4th 1632, 49 Cal. Rptr. 2d 759 (job targeting deduction held not to constitute union "dues" for purposes of enforcing state's prevailing wage law).

Given the precedents of this Court recognizing the states' right to enact and enforce laws creating a "backdrop" upon which the federally controlled labor management relations may develop, it is clear that a state is entitled to enforce its Prevailing Wage Law. Moreover, the recent case law of the circuit courts affirms the states' rightful expectation that job targeting programs will be operated in a manner which complies with the long standing exercise of the state's minimum police power.

C. Prevailing Wage Laws Are An Exercise Of Historic Police Power Of The State To Establish And Enforce Minimum Employment Standards Of General Application.

Ohio's Prevailing Wage Law, enacted in 1931, predates the National Labor Relations Act. This Court has recognized that states "possess broad authority under their police powers to regulate the employment relationship to protect workers within the State," including "minimum and other wage laws." *Metropolitan Life Ins. Co. v. Commonwealth of Massachusetts*, 471 U.S. 724, 751 (1985) (quoting *DeCanas v. Bica*, 414 U.S. 351, 356 (1976)). Similarly, the Supreme Court of Ohio has declared the Prevailing Wage Law to be a traditional and sovereign exercise of general police power which "affect[s] the public health, safety, morals and general welfare and ha[s] a uniform application." *State ex rel. Evans v. Moore*, 431 N.E.2d 311, 314 (1982)(Brown, J., concurring); *see also Harris v. Van Hoose*, 550 N.E.2d 461, 462 (1990).

The Ohio Supreme Court's failure to recognize the state's authority to enforce its traditional prevailing wage laws in the face of federal preemption claims conflicts directly with this Court's recent decision in *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 117 S. Ct. 832 (1997). In that case, the Court considered for the first time a claim that a state's prevailing wage law was preempted by federal labor law. The federal labor statute involved in *Dillingham* was ERISA, 29 U.S.C. § 1144, a law

which contains an explicit provision "conspicuous for its breadth" in preempting state laws. 117 S. Ct. at 837.

Notwithstanding the broad scope of ERISA preemption,[4] the Court in *Dillingham* refused to find federal preemption of state prevailing wage laws, absent factors not pertinent here. The Court reaffirmed the principle that "where federal law is said to bar state action in fields of traditional state regulation . . . we have worked on the assumption that ***the historic police powers of the States were not to be superseded*** by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 838 (quoting *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671, 1677 (1995) and *Rice v. Santa Fe elevator Corp.*, 331 U.S. 218, 230 (1947)) (emphasis added).

The Court specifically found that state prevailing wage laws embody long standing traditional exercise of state police powers (as found by the Fourth Appellate District here), and that "we are reluctant to alter our ordinary assumption that the historic police powers of the States were not to be superseded by the Federal Act." *Dillingham*, 117 S. Ct. at 838. Finding that California's state prevailing wage law was "no different from myriad state laws in areas traditionally subject to local regulation, which Congress could not possibly have intended to eliminate," *Id.* at 842, the Supreme Court found the prevailing wage law not to be preempted, even by the broadest of federally preemptive labor laws.

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[4] ERISA's preemptive effect on state laws is unquestionably broader than that of the NLRA. Whereas the NLRA contains no express provision preempting state laws, ERISA explicitly preempts all "related" state laws in the broadest possible terms. For this reason, in several cases prior to *Dillingham* involving state prevailing wage laws challenged under both the NLRA and ERISA, courts had found the state laws to be preempted by ERISA but not by the NLRA. *See, e.g., General Electric v. New York Dep't of Labor*, 891 F.2d 25, 27-28 (2d Cir. 1989).

Ironically, several of the amici who supported the Respondents' position before the Supreme Court of Ohio were the strongest proponents of the outcome in *Dillingham*, and they have also been the strongest advocates of state prevailing wage laws in general, when it has suited their interests. In particular, the Building and Construction Trades Department, AFL-CIO, along with other unions and unionized contractors, wrote vigorous briefs to the Supreme Court in *Dillingham*, ***opposing*** federal preemption of state prevailing wage laws.

The reason for the role reversal is clear. In the past, unions and unionized contractors have sought to use prevailing wage laws as a shield against lower cost non-union competition; but in the present case, the same parties are seeking to defend a "market recovery" tactic by which they themselves are seeking to redistribute employee wages to select contractors in facial violation of the Prevailing Wage Law. As the federal courts found in *Reich* and *Brock*, the Fourth Appellate District rightly discerned that the state's enforcement of its minimum labor standards should apply equally to both unionized and non-union contractors. The Ohio Supreme Court erred in reversing that finding.

The Respondents should not be allowed to evade their obligations under the Prevailing Wage Law, which establishes neutral, minimum labor standards applicable to ***all*** construction employees on public works, just as they may not exempt themselves from state trespass laws. While both types of state laws may minimally influence conduct generally protected by the NLRA, "there is no suggestion in the legislative history of the [NLRA] that Congress intended to disturb the myriad state laws then in existence that set minimum labor standards." *Metropolitan Life Ins. Co.*, 471 U.S. at 756. The prevailing wage standards at issue merely constitute a traditional exercise of state police power, which Congress has expressed no intention to preempt on behalf of unionized contractors and which serve as a lawful "backdrop" to the collective bargaining process. *See Metropolitan Life*

Ins., 471 U.S. 724 (1985) (upholding against NLRA preemption state minimum standards regarding insurance coverage); *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1 (1987)(same).

CONCLUSION

For the reasons stated above and in the brief of Petitioner J.A. Croson, this Court should grant a writ of certiorari to the Supreme Court of Ohio and determine the merits of Petitioner's appeal.

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